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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 636.

MARVIN E. BRAWNER,
Petitioner,

v.

MATTIE BRAWNER,
Respondent.

RESPONDENT'S BRIEF

In Opposition to Petition for Writ of Certiorari.

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QUESTION PRESENTED FOR REVIEW.

Under the above caption, petitioner takes the position that under Missouri law he has a cause of action against respondent, but that the state wrongfully refuses to permit him to maintain this suit for its enforcement. Re-

spondent suggests that petitioner states the issue too narrowly. The question for review is:

Conceding that Missouri, for reasons of public policy referable to its police power, has, during the entire one hundred thirty-nine years of its existence, adhered to the common law rule prohibiting suits between husband and wife to recover damages for personal torts committed during coverture, does the refusal of the Supreme Court to abrogate the rule in the instant case, for substantial reasons set forth in its opinion, deprive petitioner of due process or deny him the equal protection of the laws, in contravention of § 1 of the 14th Amendment?

SUMMARY OF ARGUMENT.

I. In its opinion in this case, the Supreme Court of Missouri, *en banc*, adheres firmly to the rule that, because of a common law immunity, neither spouse can maintain an action against the other to recover for a personal tort committed during coverture. Any implication to the contrary, based upon prior expressions by a division of the Court, are not authoritative and are ineffective for any purpose.

II. The rule of spousal immunity from this type of action has been in effect during the entire period of Missouri statehood. It is the public policy of the state, expressed in accordance with its police power to regulate the various aspects of the marital relationship. The rule is not arbitrary, but on the contrary is based upon substantial grounds referred to in the opinion, upon which the state authorities could reasonably deem that the rule is required for the public welfare. The Court below, in declining to abrogate the rule, did not deprive petitioner of due process in contravention of § 1 of the 14th Amendment.

III. The rule is not discriminatory. It applies equally to all persons within the marital relationship. The classification is a reasonable one, and the rule is well adapted to the end to be accomplished, that is, the prevention of damage suits between husband and wife. The rule does not deny petitioner the equal protection of the laws guaranteed by the 14th Amendment.

IV. In conformity to the rulings of this Court in analogous cases, the petition should be denied for the reason that no substantial Federal question is presented.

ARGUMENT.

I.

Missouri adheres to the rule that, for reasons of public policy, one spouse is not permitted to maintain an action against the other for a personal tort committed during coverture.

In Ennis v. Truhitte, Administrator (Mo. Sup. en banc, 1957), 306 S. W. 2d 549, the Court permitted a widow to recover against her husband's estate for injuries suffered in an automobile accident prior to her husband's death. In its opinion the Court recognized that the law of Missouri denied to one spouse the right to recover against the other for a personal tort committed during coverture. But the Court said that in this case, the husband being dead and the action having been instituted against his administrator, "the reasons of policy upon which the rule is based, the fact of their being husband and wife, have vanished." The Court said further that the circumstances of this particular case did not infringe any reasons of policy.

Hamilton v. Fulkerson (Mo. Sup. Div. 1, 1955), 285 S. W. 2d 642, involved a suit by a wife against her husband based upon a premarital tort. The Court, noting that the general rule in Missouri prohibited tort litigation between spouses, held that a provision of the Married Women's Act, quoted in the opinion, specifically authorized a married woman to maintain suit upon any right in action existing at the time of the marriage, with the same force and effect as if she were a *femme sole*. The Court stated that it refrained from expressing any opinion regarding the prior cases which established the general rule, and concluded its opinion with the statement: "Our holding herein is limited to the factual situation involved in the instant case." (285 S. W. 2d 648.)

Divisional opinions of the Supreme Court of Missouri are not authoritative, insofar as they conflict with decisions of the Court en Banc. [State ex rel. Shell Petroleum Corp. v. Hostetter (Mo. Sup. en banc, 1941), 156 S. W. 2d 673, 678, 348 Mo. 841, 851; State ex rel. Nevins v. Hughes (Mo. Sup. 1941), 149 S. W. 2d 836, 840, 347 Mo. 968, 976. See also Patterson v. Colorado, 205 U. S. 454, 461, 51 L. Ed. 879.]

The opinion of the Supreme Court in the present case was rendered by the Court en Banc in 1959. In the opinion, the Court, for reasons of public policy, firmly adheres to the common law rule of spousal immunity against suits for personal torts committed during coverture. Any implication to the contrary, based upon either the Ennis or Hamilton opinions, should be disregarded as unauthoritative and of no effect as against the later decision of the Court en Banc in the present case.

II.

In declining in the present case to abrogate the common law rule, the Court did not act arbitrarily, but based its conclusion upon weighty reasons, referable to the police power. The ruling did not deny petitioner due process.

In denying petitioner's contention that the dismissal of his suit violated due process under the 14th Amendment, the Court held that it was within the police power of the state to regulate the obligations and duties of husband and wife incident to the marriage relation.

In this connection, the opinion states that the common law rule of spousal immunity had been in existence during the entire period of Missouri statehood. The Court weighed the divergent views on the subject, expressed by the Courts and Legislatures of the various states, and by legal writers on the subject. Among the matters consid-

ered were the fact that, by statute or judicial decision, some states permit such actions, some states prohibit them, and in one state, New York, they are permitted, but are by statute excluded from insurance coverage unless specifically covered in the policy. The Court also considered the arguments for and against the rule, such as the effect of such suits upon domestic harmony, the possibility that insurance coverage would tend to induce collusive claims, since both spouses would stand to benefit from the recovery, and the bearing of the rule upon other phases of the marital relation dealt with by the Legislature, such as privileged communications, the husband's liability for the wife's support and medical expenses, and the children's right of inheritance. Impelled by these considerations, the Court said that obviously the general assembly was better equipped than was the Court to investigate and develop the facts pertinent to a determination of this phase of public policy, and also had greater authority to deal with the problem and at the same time the related ones. The Court declined to abrogate the common law rule, and said that if the public interest required a change, it should be made by the general assembly.

We believe it is apparent that there was nothing arbitrary or unreasonable in the Court's ruling in this case, either in its manner of dealing with the problem or its conclusion. It reached its conclusion only after a thorough consideration of the many factors bearing upon the problem before it. In deferring to the Legislature, for any change the public interest required, the Court's ruling was reasonable and prudent, because the Legislature possesses powers of investigation which the Court lacks, and has the power, in making any alteration deemed desirable in the rule, to adopt such safeguards and limitations as the public welfare requires. We do not believe that due process required the Court, as an agency of the state, to ignore the public welfare in this matter.

Petitioner apparently contends in his argument (p. 9) that the state, acting through the Court, had the right to abolish outright all causes of action based upon marital torts, but had no right to refuse to abrogate the rule that one spouse is not permitted to maintain an action of this type against the other because of the common law immunity. Petitioner's argument, we believe, overlooks the fact that the resultant effect upon petitioner's action would have been the same in either instance, and that if the complete abolishment of the cause of action in this type of case would not violate due process, the accomplishment of the same result by another method would necessarily be permissible also. (Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 654, 47 S. Ct. 669, 71 L. Ed. 1279.) In this connection, see the remark of Hudson, L. J., in Broom v. Morgan (1953), 1 All Eng. Repts. 849, that the disability to sue is not merely procedural, but is also a substantive disability based upon public policy. We believe this view of the rule is sound.

Due process does not require the state to use the one method rather than the other to accomplish the object in view, which is the prevention of damage litigation between husband and wife on account of personal wrongs alleged to have occurred during the relationship. The method adopted by the Court, that is, the refusal to abrogate the common law rule against such actions, was appropriate to the end in view, and sufficient for its accomplishment. No proper interpretation of the due process clause could require the Court to go further, when all the situation called for was to allow the common law rule to stand.

The Court below, in rejecting petitioner's contention on this subject, held that a regulation that is fairly referable to the police power of the state, in that it is designed to protect the health, safety, peace, comfort and general welfare, does not infringe upon the constitutional guaranty of due process unless the regulation passes the bounds of

reason and assumes the character of arbitrary power. This ruling is in accord with the rulings of this Court in similar situations.

In Fearon v. Treanor (1937), 272 N. Y. 268, 5 N. E. 2d 815, 109 A. L. R. 1229, the New York Court of Appeals upheld, as against constitutional objections, a statute abolishing breach of promise suits. An appeal to this Court by plaintiff was dismissed "for the want of a substantial Federal question." (301 U. S. 667, 57 S. Ct. 933, 81 L. Ed. 1332.)

In Hanfgarn v. Mark (1937), 274 N. Y. 22, 8 N. E. 2d 47, the question was whether a statute abolishing the right of action to recover damages for alienation of affections and criminal conversation was repugnant to and violative of the 14th Amendment. A negative answer by the New York Court of Appeals was followed by an appeal to this Court. For the same reason stated in the Fearon case, supra, this Court dismissed the appeal. (302 U. S. 641, 58 S. Ct. 57, 82 L. Ed. 498.)

In Abbott v. National Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217, this Court affirmed a decision of the Supreme Court of Washington holding that words used in a pleading cannot be made the foundation of an action for damages for libel, against the charge that the decision deprived plaintiff of his property without due process, in violation of the 14th Amendment. This Court said that the decision did not deprive the plaintiff of any property, and only adjudged that he could not proceed against defendants in violation of what the Court deemed to be the principles of law governing the case.

In Allen v. Caterpillar Tractor Co. (C. A. 7), 96 F. 2d 937, the Court held that the Supreme Court of Illinois, in holding that an employee could not recover against his employer for an occupational disease contracted in the course of the employment, did not violate due process.

In Silver v. Silver (1929), 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221, 65 A. L. R. 939, the plaintiff challenged the validity under the 14th Amendment of a Connecticut statute providing that no person carried gratuitously as a guest in an automobile may recover from the owner or operator for injuries caused by its negligent operation. Upon appeal to this Court from a judgment of the Supreme Court of Connecticut, upholding the constitutionality of the statute, this Court affirmed.

In Mondou v. New York, N. H. & H. R. Co. (1912), 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327, this Court held that the abolition by Congress of the common law defense of fellow servant, and the restriction of the defenses of contributory negligence and assumption of risk did not violate the 5th Amendment. In the course of the opinion it is said that a person has no property, no vested interest, in any rule of the common law. It is, we submit, more clearly manifest that petitioner has no basis for his complaint that the Court below, in refusing to abrogate a common law rule which has been in effect in the state for one hundred thirty-nine years[1], has deprived petitioner of his property without due process of law.

In this connection, petitioner contends (Argument, p. 8) that one practical effect of barring interspousal actions for marital torts in one jurisdiction may be that litigants will resort to other jurisdictions where such suits are permitted. This argument, we believe, is addressed to the wisdom and expediency of the decision below, and not to the question of constitutional power. (Standard Oil Co. v. City of Marysville, 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856.)

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[1] See Frank v. Maryland, 359 U. S. 360, 370, 3 L. Ed. 2d 877, 79 S. Ct. 804.

III.

The opinion below does not deny petitioner the equal protection of the laws.

Petitioner invokes the equal protection clause of the 14th Amendment, on the ground that the state denies to him, but allows others similarly situated, the right to maintain suits of the type in question. Factually, this contention is not supported by the opinion below, under which the ruling applies equally to all husbands and wives. This is clear from the statement in the opinion (Petition, Appendix A, p. 16), that "In the present state of the law, one spouse is not permitted to maintain this type of action against the other because of the common law rule of immunity," and the Court's statement (Appendix A, p. 22), that it refrained from abrogating the rule. The Court's opinion in Deatherage v. Deatherage, 328 S. W. 2d 624 (Petition, Appendix C, p. 43), shows that the rule is applied whether the wife or the husband is the plaintiff.

That it is competent for the state, whether by its legislative or judicial agencies, to enact rules applying to all phases of the marital relationship appears to us to be clear beyond doubt. Petitioner's position is based in part upon arguments addressed to the Missouri Married Women's Acts and decisions thereunder. (Petition, pp. 9, 11, 12.). If the state has authority to adopt rules relating to married women, by the same token it is authorized to adopt rules governing husband and wife. The classification followed in the present case is well within the reasonable discretion of the state authorities. (Goesaert v. Cleary, 335 U. S. 464, 69 S. Ct. 198, 93 L. Ed. 163.) It applies to all members of the class without discrimination, and does not offend against the constitutional provision invoked by petitioner. (Fearon v. Treanor, supra; Williamson v. Lee Optical of Okla., 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563; Young v. Masci, 289 U. S. 253, 26[illegible]

S. Ct. 599, 77 L. Ed. 1158; Safeway Stores v. Oklahoma Retail Grocers Ass'n., 360 U. S. 334, 341, 79 S. Ct. 1196, 3 L. Ed. 2d 1280.)

In Woltman v. Woltman (1922), 153 Minn. 217, 189 N. W. 1022, a suit by a wife against her husband to recover on account of injuries sustained in an automobile accident, the Court, applying the spousal immunity rule, sustained a demurrer to the petition, and rejected plaintiff's contention that the rule denied equal protection under the 14th Amendment, because the rule applied equally to both spouses.

IV.

CONCLUSION.

Petitioner has failed to show that the Supreme Court of Missouri, in its opinion in this case, decided a Federal question of substance not heretofore determined by this Court, or in a way probably not in accord with applicable decisions of this Court.

Respondent therefore submits that the petition should be denied.

Respectfully submitted.

JOHN S. MARSALEK,
Counsel for Respondent.